

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 95-1946

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

JADAIR INCORPORATED,

PLAINTIFF-APPELLANT,

v.

UNITED STATES FIRE INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

**MESIROW INSURANCE SERVICES, INC., WEST BEND
AIR, INC., STANLEY AIRCRAFT & ENGINE SERVICE,
INC., EMPLOYERS REINSURANCE CORPORATION AND
BLUEPRINT ENGINES, INC.,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Ozaukee County:
WALTER J. SWIETLIK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

PER CURIAM. Jadair Incorporated appeals from a summary judgment dismissing its claims against United States Fire Insurance Company (U.S. Fire) to recover damages caused by Blueprint Engines, Inc., U.S. Fire's insured.¹ The issues are whether there is coverage under a general liability airport policy issued to Blueprint and whether Jadair's bad faith and tortious interference with contract claims were properly dismissed. We affirm the judgment.

Jadair seeks to recover damages related to an aircraft engine which failed after an engine overhaul performed by Blueprint in September 1992. After the overhaul, it was discovered that Blueprint had failed to reinstall an internal oil plug. Once the plug was installed, the engine was put back into service. The engine failed on January 4, 1993. Metallic and nonmetallic particles were found in the engine oil.

When the engine failed, Jadair contacted Blueprint, which in turn put Jadair in contact with its insurance agent. The agent advised that U.S. Fire was going to send an inspector to examine the engine before repairs were made. Before any inspection was made, Jadair purchased a replacement engine. The failed engine was a "trade-in" and was shipped to the seller a few weeks after it was removed from the aircraft.

U.S. Fire denied coverage for Jadair's damages. Jadair commenced this action to recover under the insurance policy. It also alleged bad faith by U.S. Fire in investigating, processing and ultimately denying Jadair's claim and that

¹ The appeal filed by Blueprint Engines, Inc., was dismissed. See *Jadair, Inc. v. United States Fire Ins. Co.*, 209 Wis.2d 187, 562 N.W.2d 401, *cert. denied*, 118 S. Ct. 565 (1997). We do not address the dismissal of Blueprint's cross-claims against United States Fire Insurance Company.

U.S. Fire had wrongfully interfered with the contract with Blueprint by preventing Blueprint's immediate acceptance and repair of the engine. The circuit court concluded that there was no coverage under exclusion (g) in the policy. It granted summary judgment dismissing all of Jadair's claims against U.S. Fire.²

We first address the primary issue on appeal—whether there is coverage under the U.S. Fire policy.³ Summary judgment on a coverage issue is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See Calbow v. Midwest Sec. Ins. Co.*, 217 Wis.2d 675, 679, 579 N.W.2d 264, 266 (Ct. App. 1998). The interpretation of an insurance contract is a question of law for our independent review. *See id.*

Exclusion (g) in the policy provides that: “This insurance does not apply: to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.” Jadair claims that the provision is ambiguous because it was amid “pages of technical insurance verbiage” and the insured, Blueprint, is not a firm of Wall Street lawyers but is a small, family-

² Jadair argues that there was no basis for the circuit court to dismiss its claim seeking a declaration of coverage. A declaration was made that no coverage existed. It does not matter that the circuit court used the phrase that the claim be dismissed.

³ Jadair's brief first attacks the summary judgment process. It argues that the granting of summary judgment was premature because discovery had not been completed; that U.S. Fire did not establish a prima facie case for summary judgment and, therefore, it was not required to submit any contradictory materials; and that even if a prima facie case was established, genuine issues of material fact exist. Because we conclude that the insurance contract is not ambiguous, none of these factually related claims affect the coverage issue.

owned business of blue-collar mechanics.⁴ Jadair also points out that U.S. Fire paid a similar claim several months before the Jadair engine failed. None of these considerations are relevant to determining whether the words used in the exclusion are ambiguous. *See Voigt v. Riesterer*, 187 Wis.2d 459, 465, 523 N.W.2d 133, 135 (Ct. App. 1994) (construction of a contract requires reference to extrinsic facts only where its words are ambiguous); *Erickson v. Gundersen*, 183 Wis.2d 106, 118 n.3, 515 N.W.2d 293, 299 (Ct. App. 1994) (extrinsic evidence is not relevant to whether there is an ambiguity).

The language in paragraph (g) unambiguously states a “business risk” exclusion. *See Bulen v. West Bend Mut. Ins. Co.*, 125 Wis.2d 259, 262, 371 N.W.2d 392, 393 (Ct. App. 1985). Under the policy,

“The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.”

⁴ Jadair claims that a conflict of law analysis must be performed to determine if Wisconsin or Illinois law applies. The issue is a nonstarter. Jadair wants Wisconsin law to be applied but asserts that the circuit court did *not* apply Illinois law in its decision. U.S. Fire contends that the circuit court applied neither Wisconsin nor Illinois law and that it does not matter because the rules of contract interpretation are the same. There is no conflict of law to resolve.

Id. at 264-65, 371 N.W.2d at 394 (quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 791 (N.J. 1979)). In simple terms, the policy “does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident.” *Id.* at 265, 371 N.W.2d at 395.

Blueprint overhauled the engine. There was damage to the engine because of the work performed by Blueprint.⁵ There is no coverage under the U.S. Fire policy for such damage or the consequential claims.

Jadair’s bad faith claim was properly dismissed. A third-party claimant cannot assert a claim for failure to settle a claim. See *Kranzush v. Badger State Mut. Cas. Co.*, 103 Wis.2d 56, 73-74, 307 N.W.2d 256, 265 (1981). Moreover, there can be no bad faith on the part of the insurer when it is ultimately determined that there is no coverage. See *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis.2d 496, 516-17, 385 N.W.2d 171, 181 (1986). We summarily reject Jadair’s contention that a fiduciary relationship between it and U.S. Fire would support a bad faith claim. We have no authority to expand the *Kranzush* holding. See *Ristow v. Threadneedle Ins. Co.*, Nos. 97-0309 and 97-0678, slip op. at 5 (Wis. Ct. App. June 24, 1998, ordered published July 29, 1998).

Jadair argues that a genuine issue of material fact exists on its claim alleging that U.S. Fire interfered with its contract with Blueprint. It suggests that the insurance agent who advised Jadair against shipping the engine to Blueprint for immediate repair was acting with apparent or implied authority on behalf of

⁵ U.S. Fire reads Jadair’s argument to include a claim that there may have been damage to other parts of the engine not worked on by Blueprint during the overhaul. Jadair has not developed this argument and we do not consider it. See *Bartley v. Thompson*, 198 Wis.2d 323, 341-42 n.10, 542 N.W.2d 227, 234 (Ct. App. 1995). Moreover, there is nothing to suggest that the engine can be broken down into component parts unaffected by the overhaul.

U.S. Fire. It contends that the circuit court erred in concluding that the agent was not a representative of U.S. Fire and dismissing Jadair's tortious interference claim.

U.S. Fire established that the insurance agent had no authority to act on its behalf and that it did not direct anyone to give instructions to Jadair about what to do with the failed engine. Jadair did not offer any affidavit to dispute this evidence. In fact, on appeal it only cites to its complaint as suggestive of apparent and implied authority. A party may not rely on the bald assertions in the complaint. *See Transportation Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis.2d 281, 291, 507 N.W.2d 136, 139 (Ct. App. 1993) (the adverse party must counter with evidentiary material showing a triable issue of fact); § 802.08(3), STATS. Summary judgment dismissing the tortious interference with contract claim was proper.⁶

⁶ We do not find it necessary to specifically address each of the first three claims raised in Jadair's brief. *See supra* note 3. We reject Jadair's claim that the granting of summary judgment was premature because discovery was not complete. Under § 802.08(4), STATS., the circuit court has discretionary authority to delay ruling on a motion for summary judgment. *See Kinnick v. Schierl, Inc.*, 197 Wis.2d 855, 865, 541 N.W.2d 803, 807 (Ct. App. 1995) ("whether to refuse a motion for summary judgment in order to give an opposing party additional time to obtain essential facts to defeat summary judgment is a highly discretionary ruling").

The action was commenced in February 1994. At the pretrial conference, trial was set for April 24, 1995, and discovery was to be completed thirty days before trial. The motion for summary judgment was filed in November 1994. At a December 8, 1994 motion hearing, the trial court decided to put the motion for summary judgment on hold so that Jadair could depose the insurance agent. Jadair indicated that sixty days was sufficient. At a motion hearing held on March 7, 1995, Jadair suggested that before ruling on discovery motions the trial court should determine the pending summary judgment motion. Jadair did not request additional time under § 802.08(4), STATS. The motion for summary judgment was decided on May 25, 1995, well after the deadline for completing discovery. Because the record reflects ample discovery opportunity and because Jadair failed to comply with § 802.08(4), the circuit court did not misuse its discretion in not further delaying a ruling on the motion for summary judgment. *See Van Straten v. Milwaukee Journal*, 151 Wis.2d 905, 920, 447 N.W.2d 105, 111 (Ct. App. 1989).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

